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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 658

EDWARD A. MITCHELL,
Petitioner,

v.

EDWARD A. MITCHELL, JR.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF.

DEAN HILL STANLEY,
Counsel for Petitioner,
910 Shoreham Building,
Washington, D. C.

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PETITION FOR WRIT OF CERTIORARI

To the Honorable the Supreme Court of the United States:

The petition of Edward A. Mitchell respectfully shows to this Honorable Court:

I

STATEMENT OF THE MATTER INVOLVED

The question in this case is whether Emily Wallach Blair, who died in the District of Columbia on January 5, 1948, intended, when she named in the second codicil of her will, "my nephew, Edward A. Mitchell," as a legatee of certain personal property, to bequeath such property to the petitioner, who is of that name and is her nephew, or to the

respondent, Edward A. Mitchell, Jr., who is her grandnephew.

Emily Wallach Blair died a resident of the District of Columbia on January 5, 1948, leaving a last will and testament dated September 30, 1942, (R. 86), a first codicil thereto dated December 17, 1946, (R. 89), and a second codicil thereto dated May 29, 1947, (R. 90). The will and codicils were admitted to probate and record by the United States District Court for the District of Columbia, holding a Probate Court, on April 21 ,1948, (R. 22). The question herein came before the United States District Court for the District of Columbia, (herein called the District Court) by the filing by the executor of Mrs. Blair's will, of a complaint (R. 2), and supplemental complaint (R. 12), for construction of the will and codicils and for direction as to distribution.

By her will (R. 86-88) the testatrix, first, exercised a power of appointment given her in the will of her late husband, to bequeath and devise to her two sisters, Mary Alexander Mitchell and Rose Douglas Merriam, in fee simple, all property over which she had such power, and, then, bequeathed and devised all the residue of her estate in equal shares to the same two sisters.

Mary Alexander Mitchell having thereafter died, the testatrix executed the first codicil to her will (R. 89), by which she devised and bequeathed all the property which she had left in her will to Mary Alexander Mitchell, "unto Edward A. Mitchell, Jr. and Mary M. Chewning, grandchildren of Mary Alexander Mitchell," and grandnephew and grandniece of the testatrix. In all other respects the will was ratified and confirmed.

By the second codicil to her will (R. 90), the testatrix ratified and confirmed the provisions of her will and the first codicil thereto, except as she changed it by the second codicil, and thereupon provided in the second codicil as follows:

> "I give and bequeath my furniture and household effects, silverware, pictures, objects of art, jewelry, automobiles and articles of personal use, including wearing apparel, in absolute estate, unto my sister, Rose Douglas Wallach Merriam; my niece, Mary A. Chewning; and my nephew, Edward A. Mitchell, to be divided among them, one-third unto each. My Executor shall be authorized to take the joint receipt of said three beneficiaries, who shall agree among themselves as to the proper division of said articles and the particular articles which each shall receive, based on the appraised value thereof or such other method of valuation as they shall mutually consider fair and equitable."

By the allegations of the complaint (R. 4, 5, Pars. 6-10), the admissions of the petitioner and respondent in their answers (R. 9, 10, Par. 1 of answers) and the statements and admissions in the pre-trial proceedings (R. 20, 21), it appeared that there was only one question involved in the case, namely, whether testatrix's grandnephew, the respondent, Edward A. Mitchell, Jr., should be permitted to introduce extrinsic evidence in an effort to prove that the testatrix in naming in the second codicil, "my nephew, Edward A. Mitchell" as a legatee of certain portions of her personal estate, intended her nephew, Edward A. Mitchell as the legatee, or her grandnephew, Edward A. Mitchell, Jr.

The case was tried in the District Court without a jury. That court, subject to the exception of the petitioner and to a later motion to strike, received evidence offered by respondent in an effort to prove that although the testatrix named, "my nephew, Edward A. Mitchell" as legatee in the second codicil, she intended by such designation, her grandnephew, Edward A. Mitchell, Jr., the son of her nephew, Edward A. Mitchell (R. 33).

At the conclusion of the testimony the trial judge struck out all the testimony and evidence which had been received,

ruled that there was no latent ambiguity in the second codicil of the will (R. 85), and found as a matter of law (R. 23), that the petitioner, Edward A. Mitchell, nephew of the testatrix, is entitled to receive under the second codicil the property therein bequeathed to "my nephew, Edward A. Mitchell". Judgment construing the will accordingly was entered (R. 25).

On appeal, the United States Court of Appeals for the District of Columbia reversed the judgment of the District Court (R. 111), stating in its opinion that "when the whole will and the extrinsic evidence that the court struck are considered, as we think they should be, it is plain that by 'my nephew, Edward A. Mitchell' the testatrix meant the appellant [i. e., respondent herein, Edward A. Mitchell, Jr., the grandnephew]."

Jurisdiction

The jurisdiction of this Court is invoked under the provisions of Section 1254 (1) of the Act of June 25, 1948, c. 646, 62 Stat. 928; Title 28, Section 1254 (1), U.S. Code.

Questions Presented

1. Was it proper for the United States Court of Appeals to consider evidence offered in an effort to prove that the testatrix in naming "my nephew, Edward A. Mitchell" as a legatee in the second codicil of her will, meant not her nephew, Edward A. Mitchell, the petitioner, but her grandnephew, Edward A. Mitchell, Jr., and on the strength of such evidence to hold that the testatrix intended such legacy for her grandnephew, Edward A. Mitchell, Jr., rather than her nephew, Edward A. Mitchell, whom she had named?

2. If it was proper for the United States Court of Appeals to consider the evidence presented in the District Court, but stricken out, did that evidence prove that the testatrix

intended her grandnephew, Edward A. Mitchell, Jr., as legatee in the second codicil of her will, rather than her nephew, Edward A. Mitchell, the petitioner, whom she had specifically named?

Reasons Relied On for the Allowance of the Writ

It is respectfully submitted that this Court should grant the writ of certiorari and review the decision of the United States Court of Appeals for the District of Columbia for the following reasons:

1. The lower court has erroneously decided an important question of local law in a way probably in conflict with applicable local decisions.

2. The lower court has erroneously decided a question of general importance.

3. If the decision and judgment of the United States Court of Appeals remains unreversed, it will be impossible in the District of Columbia for a person accurately to describe and name in his will a legatee without the possibility and probability of having his wishes frustrated after his death by consideration of extrinsic and extraneous facts which may permit the court on the basis of mere conjecture to decide that he intended another than the one specifically named to be his beneficiary.

4. The lower court erred in holding and deciding that the specific terms of a will or codicil thereto, naming and accurately describing a specific living person as legatee, may be varied by consideration of extrinsic evidence so as to vest the legacy in another person not answering the description contained in the will.

5. The lower court erred in holding and deciding that the evidence received proved that the testatrix intended as the legatee in the second codicil of her will her grandnephew, Edward A. Mitchell, Jr., respondent herein, when she

named in the codicil of her will, "my nephew, Edward A. Mitchell," the petitioner.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Court of Appeals for the District of Columbia, commanding that court to certify to and send to this Court for its review and determination, on a day certain to be named therein, a transcript of the record of the proceedings in the case, numbered and entitled on its docket, Number 10,722, April Term, 1950, *Edward A. Mitchell, Jr., Appellant* v. *Edward A. Mitchell, Appellee*, and that said judgment of the United States Court of Appeals for the District of Columbia may be reversed by this Honorable Court, and that the judgment of the United States District Court for the District of Columbia may be affirmed.

Respectfully submitted,

EDWARD A. MITCHELL,
Petitioner.

DEAN HILL STANLEY,
Counsel for Petitioner,
910 Shoreham Building,
Washington, 5, D. C

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinions of the Courts Below

Neither of the opinions of the courts below has yet been reported. The opinion of the District Court will be found at page 83 of the record, and that of the United States Court of Appeals at page 108 of the record.

II

Jurisdiction

The date of the judgment to be reviewed is February 23, 1951, (R. 111).

The jurisdiction of this Court is invoked under the provisions of Section 1254 (1) of the Act of June 25, 1948, c.646, 62 Stat. 928; Title 28, Section 1254 (1) U.S. Code.

III

Statement of the Case

Because the case has been fully stated in the petition for writ of certiorari, *supra*, to avoid repetition a statement of the case is omitted in this brief.

IV

Specification of the Errors to Be Urged

1. The United States Court of Appeals for the District of Columbia erred in holding and deciding that extrinsic evidence was admissible and should be considered to determine whether the testatrix intended her nephew, Edward A. Mitchell, whom she had named legatee in the second codicil of her will, to be the legatee, or her grandnephew, Edward A. Mitchell, Jr.

2. The United States Court of Appeals for the District of Columbia erred in holding and deciding that when the whole will and the extrinsic evidence that the District Court struck are considered, it is plain that by "my nephew, Edward A. Mitchell" the testatrix meant her grandnephew, Edward A. Mitchell, Jr.

3. The United States Court of Appeals for the District of Columbia erred in holding and deciding that there was any evidence to show that the testatrix intended her grandnephew, Edward A. Mitchell, Jr., to be the legatee in the second codicil of her will rather than her nephew, Edward A. Mitchell, whom she specifically named.

4. The United States Court of Appeals for the District of Columbia erred in not holding and deciding that the will and codicils, when considered alone, demonstrated

that the testatrix intended her nephew, petitioner herein, as a legatee under the second codicil of her will.

5. The United States Court of Appeals for the District of Columbia erred in not holding and deciding that when the will and codicils are considered with the evidence they conclusively show that the testatrix intended petitioner, her nephew, Edward A. Mitchell, as a legatee under the second codicil of her will.

V

ARGUMENT

Summary of Argument

1. The testatrix in the second codicil of her will bequeathed personal property to her nephew, Edward A. Mitchell. The testatrix was survived by petitioner, a nephew, Edward A. Mitchell, her only nephew of that name. She had in a first codicil bequeathed one-half of her estate to a sister, one-quarter to a grandnephew, Edward A. Mitchell, Jr., and one-quarter to a niece, a sister of Edward A. Mitchell, Jr. both described as grandchildren of a deceased sister who in the will was bequeathed and devised this one-half of the estate. The District Court struck out evidence offered in an effort to show that when the testatrix named her nephew, Edward A. Mitchell, as legatee in the second codicil, she meant her grandnephew, Edward A. Mitchell, Jr., and ruled that petitioner, testatrix's nephew, is the legatee under the second codicil.

The United States Court of Appeals for the District of Columbia considered the evidence stricken out by the District Court and held that the will and evidence demonstrated that the testatrix intended her grandnephew, Edward A. Mitchell, Jr., as legatee. The judgment of the District Court was reversed. This was error. The will and codicils provided in unequivocal terms that petitioner,

testatrix's nephew, is the legatee of the same name and description mentioned in the second codicil. Extrinsic evidence is not admissible to vary the terms of a will when, as in the case at bar, "the description applies completely to a certain person or persons and to no others". Page on Wills, Third Edition, 1941, Vol. 4, page 645, Section 1622, and cases cited, *infra* at page 14.

2. Even if admissible, the evidence fails to prove that the testatrix when she named petitioner, her nephew, a legatee in the second codicil, intended her grandnephew, Edward A. Mitchell, Jr. Quite to the contrary, the evidence shows that in all her formal and business documents, testatrix referred to her grandnephew as Edward A. Mitchell, *Jr.*

Since respondent before the execution of the second codicil received one-quarter of testatrix's estate under the first codicil, there was no point to the testatrix executing a second codicil in his favor which would increase his share in certain articles of personal use from a quarter interest to a third interest and in value by only approximately $3,500.00. This is particularly true when it is observed that respondent, aside from the property of personal use here involved, received benefits of approximately $53,000.00 under the will. Furthermore, it seems unlikely testatrix would decrease from one-half to a third the interest of a sister in these articles of personal use in order to increase the share therein of a grandnephew. It is more probable that she wished to remember the father, petitioner herein, of the grandnephew and grandniece who together were to receive one-half of the bulk of her estate.

In addition to all this the bank official to whom the testatrix gave her instructions for the preparation of the second codicil, testified that she instructed him to provide in that codicil for her *nephew, Edward A. Mitchell.*

Even, therefore, if admissible, the evidence does not support respondent's claim.

A

When the Will of Emily Wallach Blair and the Two Codicils Thereto are Considered, Petitioner, Edward A. Mitchell, Testatrix's Nephew, Clearly Appears to be the Legatee Described by the same Name and Relationship to the Testatrix in the Second Codicil of the Will and Extrinsic Evidence Should not have been Considered to Vary the Specific Terms of the Instrument.

By her will (R. 86), the testatrix bequeathed all her residuary estate in equal shares to her two sisters, Mary Alexander Mitchell, and Rose Douglas Merriam. By the first codicil, because one of the sisters, Mary Alexander Mitchell, had died, the share the deceased sister would have taken under the will was devised and bequeathed unto Edward A. Mitchell, Jr., and Mary M. Chewning, grandchildren of the deceased sister.

From the will and the first codicil (R. 89), it appears that the testatrix wished, first, to leave all she possessed to her two sisters, and second, one of those sisters having died, to the two sisters or certain of their descendants.

The will and codicils also demonstrate, without resort to extrinsic evidence, that the testatrix had a grandnephew whose name is Edward A. Mitchell, Jr., because he is described in the first codicil as the grandson of the sister, Mary Alexander Mitchell, and was, therefore, the grandnephew of the testatrix.

The first codicil (R. 89), also demonstrates that the testatrix knew the grandnephew as Edward A. Mitchell, *Jr.*

Before the execution of the second codicil, therefore, one-half of the estate of the testatrix would have passed to her sister, Rose Douglas Merriam, and one-half to the two grandchildren of the deceased sister, Mary Alexander Mitchell. In both the will and the first codicil, Rose Douglas Merriam received one-half of the estate.

In the second codicil (R. 90), the testatrix segregates from her personal estate certain specific categories of personal property, all of which are articles of personal use, and bequeaths them in equal shares to the sister, Rose Douglas Merriam, Mary A. Chewning, who is described as a niece, and "my nephew, Edward A. Mitchell".

The Court of Appeals supports its decision in part (R. 110) upon the reasoning that unless the words "my nephew, Edward A. Mitchell" mean my grandnephew, Edward A. Mitchell, Jr., the testatrix decided "between the dates of the two codicils * * * * * to withdraw from her favorist grandnephew the equal treatment with his sister that she had previously given him". The Court of Appeals overlooked the fact that in executing the second codicil at all, the testatrix was reducing to one-third the share in a part of her property of one of her favorite sisters, Rose Douglas Merriam, who had in the will and first codicil been given one-half of all the property.

The mere fact that the grandnephew, Edward A. Mitchell, Jr., would not receive any portion of these personal effects, whereas his sister would receive one-third of them, does not prove that the testatrix did not intend to remember petitioner in her will. As a discussion, *infra*, of the evidence will show, the grandnephew will receive property and money of approximately $53,000.00, exclusive of these personal effects (R. 28), and, because he is legatee under the first codicil of twenty-five per cent of the entire estate, his share in the estate will be increased by only $3,500.00 if he is adjudged to be the legatee named in the second codicil.

The Court of Appeals also finds a basis for its decision in the fact that to hold that petitioner was the person intended in the second codicil, it is necessary to decide that the testatrix had decided to make a gift to a nephew whom she had previously ignored, while she continued to ignore all other members of his generation. It is not unreason-

able to suppose, if conjecture is to be indulged in, that the testatrix had decided to make provision for the son of the favorite sister named in the will and who had died, and for the father of the favorite grandnephew and grandniece who otherwise were so liberally provided for.

It was no more unsual to deprive the grandnephew of this small portion (R. 28) of the estate than it was to reduce the portion the sister, Rose Douglas Merriam, was to receive. Presumably, the sister was closer to the testatrix sentimentally as well as in relationship than the grandnephew and the grandniece.

Much emphasis has been placed during the progress of the case upon the fact that the grandniece was designated as "niece" rather than grandniece in the second codicil. This was plainly a scrivener's error. There can be no question that the grandniece was intended. The description of "niece" may be struck out and enough remain in the will to identify the grandniece within the doctrine of *Patch* v. *White*, 117 U.S. 210, 6 Sup. Ct. 617. This cannot be said for the designation "my nephew, Edward A. Mitchell". Even if "nephew" is stricken, we still do not have the name of the grandnephew, which is Edward A. Mitchell, Jr., a designation by which the testatrix knew the grandnephew, as demonstrated by her description of him in the ~~second~~ codicil.

It is relevant to inquire how the testatrix could have provided for the petitioner in any other way. His name is Edward A. Mitchell and he is her nephew.

The District Court admitted, subject to petitioner's exception, testimony intended to show that the testatrix intended her grandnephew, Edward A. Mitchell, Jr., as legatee in the second codicil of her will rather than her nephew, Edward A. Mitchell, whom she named (R. 33). At the conclusion of the testimony the court struck out all of the testimony and evidence (R. 85) and held as a matter of law that no latent ambiguity existed in the will

and that the legatee named therein is the testatrix's nephew, Edward A. Mitchell, the petitioner.

The rule is universal that extrinsic evidence may not be received and considered to change the specific provisions of a will. Such evidence is properly admitted and considered only where the intention of the testator cannot, because of ambiguity, be determined from the wording of the will.

Patch v. *White*, 117 U.S. 210, 6 Sup. Ct. 617.
Gilmer v. *Stone*, 120 U.S. 586, 7 Sup. Ct. 689.
Lipphard v. *Humphrey*, 209 U.S. 264, 28 Sup. Ct. 561.
Kaiser v. *Brandenburg*, 16 App. D.C. 310.
Association of Survivors of Seventh Georgia Regiment v. *Larner, et al.*, 55 App. D.C. 156, 3 F. (2d) 201.
Buchanan v. *National Savings and Trust Company, et al.*, 57 App. D.C. 386, 23 F. (2d) 994.
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Mayo v. *Whedon*, 47 App. D.C. 138.
Decker v. *Decker, et al.*, 121 Ill. 341; 12 N.E. 750.
Fersinger v. *Martin*, 183 Md. 135; 36 A. (2d) 716.
Mahoney v. *Grainger*, 283 Mass. 189; 186 N.E. 86.
Lincoln v. *Perry*, 149 Mass. 368; 21 N.E. 671.
Smith v. *American Missionary Association*, 240 Mass. 26; 132 N.E. 358.
Jackson v. *Sill*, 11 Johnson's (N.Y.) 201.

The decisions of the District of Columbia court cited above conclusively show that the lower court's decision runs counter to well recognized principles of law long established in that jurisdiction.

It is respectfully submitted that when only the contents within the four corners of the will and codicils are considered, only one conclusion can be reached, namely, that the petitioner is the legatee named in the second codicil as "my nephew, Edward A. Mitchell". The description of the legatee, Edward A. Mitchell, in the second codicil of

testatrix's will is not ambiguous. He is named as "Edward A. Mitchell". He is Edward A. Mitchell. He is described as "nephew". He is testatrix's nephew. There is an Edward A. Mitchell, Jr., but testatrix by so describing him in the first codicil of her will as "Edward A. Mitchell, Jr." showed on the face of her testamentary documents that she distinguished between the two. Under such circumstances, the principles stated in the foregoing cases forbid the acceptance of extrinsic evidence to change the testatrix's wishes to provide for her nephew, Edward A. Mitchell.

B

No Evidence Considered by the Lower Court, if Admissible, Demonstrates that the Testatrix Intended Any Other Person than Her Nephew, Edward A. Mitchell, Petitioner Herein, as the Recipient of the Bequest to the Person of that Name and Description in the Second Codicil of Her Will.

When one contemplates that the evidence offered in the District Court was intended to change the specific and unambiguous terms of a will, its character and weight appear trivial.

At the outset of the trial in the District Court, before any evidence was offered, it appeared in the record before the Court that the testatrix had a nephew whose name is Edward A. Mitchell, and a grandnephew whose name is Edward A. Mitchell, Jr. The complaint so states (Pars. 1-8, R. 2-4) and the petitioner and respondent in their answers admit it (Par. 1, R. 9, 10). Furthermore, the pre-trial proceedings relate these facts (R. 20). The lower court chose to ignore the use of "*Jr.*" in the grandnephew's name and, referring to the relationship of petitioner and respondent to testatrix's sister rather than to testatrix, stated that in its "opinion the fact that a sister of the testatrix had both a son and grandson named Edward A. Mitchell is enough, in itself, to make the term 'my nephew,

Edward A. Mitchell' ambiguous, and it is immaterial whether the fact does or does not appear on the face of the will and codicils" (R. 110).

No evidence was offered in the District Court, and there was none before either lower court, designed to show that a latent ambiguity in the will existed. All the evidence was offered in an effort to show that the testatrix, having a nephew, Edward A. Mitchell, and a grandnephew, Edward A. Mitchell, Jr., intended the grandnephew as the legatee, even though she named the nephew as such. None of the evidence proves this proposition. If anything, it proves quite the contrary, as the following review of it will show.

The testimony of the witness, Tyler, (R. 34-40) was incompetent and inadmissible upon any theory of evidence. He had prepared and secured the execution of the first codicil to the will in which the grandnephew was named as Edward A. Mitchell, *Jr.* (italics supplied). He prepared the second codicil but was not present at its execution and had nothing whatsoever to do with its execution. He stated that he was told by the officers of the bank at which the testatrix did business, what the second codicil was to contain. On cross-examination he testified that he had not affixed "jr." after the name Edward A. Mitchell in the second codicil, "I think probably", because it was not expressed in the instructions that he got (from the officers of the bank) or the "impression" that he received (R. 39). He further states that he had heard of only one Edward A. Mitchell and did not know that another one existed until he was asked to testify in this case. He was asked the following question and made answer thereto on cross-examination (R. 39):

> Q. So, when you put, from the instructions from the testatrix, 'Edward A. Mitchell, Jr.' in the first codicil it never occurred to you that there had been a Senior around or had at some time been a Senior, did it?

A. I think we all know that where there is a Junior there has been a Senior. I think the Court can take judicial notice of that fact."

He further stated on cross-examination (R. 40):

"Q. Did you know Edward A. Mitchell, Jr. was a grandnephew or simply a nephew? A. I do not know now. This has been several years. I do not know what I knew as to that relationship."

Several witnesses testified that in daily intercourse the testatrix referred to the respondent as "Nephew" and "Neddie" (R. 42, 45, 50, 54, 59, 64, and 69). On the other hand, the principal witness in the case, the executor of the will, the plaintiff in the case before the court, testified that he was quite sure that the testatrix may have referred to the petitioner also as "Nephew" (R. 57).

One witness testified that during the latter months of her life the testatrix called upon the respondent to transact her business for her (R. 42), but respondent himself stated upon cross-examination that he would not say he had transacted considerable business for the testatrix. He testified that he acted for her on two or three occasions (R. 71).

One of the servants of testatrix testified that the testatrix during the last year of her life had often said she wanted the grandnephew and the grandniece "to have her lovely things, because they would appreciate them" (R. 43).

The witness, J. Fontaine Hall, who was the bank official who had given the witness, Tyler, his instructions as to the contents of the second codicil (R. 52), testified as follows:

"Q. I believe that you testified that Mrs. Blair in instructing you with reference to the second codicil, and if I am wrong you correct me, was that it was to be changed so that one-third of the personal property would go to her niece, Mary Chewning, and one-third of the personal property to go to her nephew, Edward A. Mitchell; is that what you testified to a little earlier? A. I testified that was her intention.

Q. I am asking if that is what she instructed you to do. A. I am not saying what was her instruction. It was her intention.

Mr. Stanley: I object and ask that it be stricken out.

The Court: Sustained. The Court cannot permit this to go on.

By Mr. Nicolaides:

Q. What did she tell you, Mr. Hall? A. She told me to have a codicil prepared for one-third of the property to go to *her nephew, Edward A. Mitchell and one-third to Mary A. Chewning.*" (Italics supplied)

It is to be observed that he states the instructions were "my nephew, Edward A. Mitchell". There is no description of "Mary A. Chewning" as to relationship.

Thus *the only person who had talked to the testatrix about the contents of the second codicil to her will* and who is Vice President (R. 49) of the same bank of which the executor of the will is President (R. 53), and who would not be presumed to color his testimony in favor of the petitioner, states that the testatrix directed him to prepare the codicil in favor of her nephew, Edward A. Mitchell and Mary A. Chewning, without describing the relationship of Mrs. Chewning to testatrix.

The strongest reason for holding that the testatrix intended in the second codicil to provide for the petitioner, her nephew, Edward A. Mitchell, is evidenced by the fact that if she was providing for petitioner, there was a substantial reason for the execution of the second codicil because by it the petitioner would receive property of a value of approximately $14,000.00. On the other hand, if the respondent is held to be the person intended in the second codicil, his share in the estate is increased by approximately only $3,500.00. It is hardly to be assumed that the testatrix would make a change in her will merely to increase the interest of the respondent in household and other property of personal use from twenty-five per cent

to thirty-three and one-third per cent. This reasoning is supported by the following facts:

The effect of the second codicil is merely to lift from the corpus of the testatrix's entire estate which was devised and bequeathed in the will and the first codicil, certain property of personal use, which the inventories filed in the estate show was appraised at or partially sold for, an aggregate of, $42,250 (R. 28).

The fact that the grandnephew, Edward A. Mitchell, Jr., will not share in a third of this property in the approximate value of $14,000.00 (R. 28), if the literal words bequeathing that third to the "nephew, Edward A. Mitchell", are accepted, does not operate in any degree to disinherit the grandnephew, Edward A. Mitchell, Jr. Under the first codicil, the grandnephew, Edward A. Mitchell, Jr., shares with his sister, Mary M. Chewning, not only in half of all the other personal property of the testatrix but, with his sister, in half of all the property which had been owned by the testatrix's deceased husband and over which she exercised in her will a power of appointment given her in her husband's will.

Exclusive of personal property bequeathed in the second codicil, the grandnephew, Edward A. Mitchell, Jr., will receive, as his share in the net assets of the estate, property and money of approximately $53,000.00 (R. 28).

If the testatrix had not executed the second codicil to her will, the grandnephew, Edward A. Mitchell, Jr., would in any event under the will and the first codicil have received twenty-five per cent. of the personal property covered by the second codicil, property of an approximate value of $10,500.00. It is hardly reasonable to assume that the testatrix who was leaving the grandnephew in any event property of a value of approximately $53,000.00 would have changed her will by codicil to increase the grandnephew's share in the least valuable assets of her estate by a mere $3,500.00.

A great effort was made in the testimony to show that the testatrix and the petitioner were not on friendly terms. Respondent's sister, petitioner's daughter, endeavored by very strong language to indicate that the testatrix disliked petitioner because she objected to his third marriage (R. 60). This testimony of a palpably antagonistic witness, however, was toned down to a very marked degree upon cross-examination (R. 60-63). On cross-examination it appeared that the petitioner and his present wife were entertained by the testatrix on several occasions (R. 61), and that the witness found no substantial reason other than whim for testatrix's attitude to petitioner's wife (R. 61). All of this testimony was completely refuted by the unrebutted testimony of petitioner (R. 75 to 80).

In the testimony he offered, respondent apparently was endeavoring as much to show that his father, the petitioner, was disliked by the testatrix and therefore she was not likely to remember him in her will, as he was to demonstrate that the testatrix intended him rather than his father as legatee under the second codicil. The failure of this effort is demonstrated by the unrebutted testimony of the petitioner.

In rebuttal to the foregoing testimony, the petitioner, reserving his exception to the respondent's testimony, offered in evidence certain documents clearly proving that the testatrix had in mind the difference between Edward A. Mitchell, the nephew, and Edward A. Mitchell, Jr., the grandnephew. One of these documents was an authorization executed by the testatrix less than five months before her death for access to her safe deposit box. As originally typewritten, this authorization (R. 105, 72) permitted three persons, none of whom was Edward A. Mitchell, Jr., to enter the box. Before signing the authorization, however, the testatrix drew a line with her own hand through one of these names and wrote by hand in the margin, "Edward A. Mitchell, Jr." Here again is

clear evidence that the testatrix was not laboring under any misapprehensions as to the differences between her nephew and her grandnephew.

In further rebuttal the petitioner offered in evidence eleven cancelled checks dated on various dates from 1942 to December 1947 (R. 93-104), all in the handwriting of the testatrix and all of which she made payable either to E. A. Mitchell, Jr. or Edward A. Mitchell, Jr. Here again, over a period of five years is clear, unmistakable and conclusive evidence that the testatrix differentiated between her grandnephew and her nephew.

Another authorization to enter her safe deposit box, signed by the testatrix and executed approximately one month before her death, names her grandnephew, Edward A. Mitchell, Jr., as one of those authorized (R. 106).

Even assuming that there was justification for consideration of evidence to determine whether the testatrix intended her nephew, Edward A. Mitchell, the petitioner, as legatee, or her grandnephew, Edward A. Mitchell, Jr., the evidence proferred falls far short of showing any such intention on the part of the testatrix.

The rule governing the use of extrinsic evidence in the interpretation of a will is succinctly stated in Page on Wills, Third Edition 1941, Volume 4, Page 645, Section 1622, as follows:

> "Where the description of the beneficiary is ambiguous, the courts allow considerable latitude in the admission of extrinsic evidence to identify such beneficiary, although such evidence can not be used to contradict the terms of the will.
>
> *If the description applies completely to a certain person or persons and to no others, evidence may not be received to show that the testator intended the gift to be to others,* even if it is claimed that a mistake was made in drafting the will, but if the description can apply to either of two or more persons, parol evi-

dence, even as to declarations of the testator, is admissible to determine which was intended." (Italics supplied)

CONCLUSION

It is respectfully submitted that the foregoing demonstrates the following points:

1. That the lower court erred in considering extrinsic evidence to determine whom the testatrix, Emily Wallach Blair, intended as legatee in the second codicil of her will when she named the petitioner, "my nephew, Edward A. Mitchell" as such.

2. The evidence offered in an attempt to convince the court that the testatrix intended not her nephew, Edward A. Mitchell, whom she named as legatee, but her grandnephew, Edward A. Mitchell, Jr., falls far short of so proving.

3. The person named in the second codicil of testatrix's will as "my nephew, Edward A. Mitchell", is the petitioner herein who is entitled to receive the legacy she provided for him.

Respectfully submitted,

DEAN HILL STANLEY,
Attorney for Petitioner
910 Shoreham Building,
Washington, D. C.

April, 1951

MAY 4 1951

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 658.

EDWARD A. MITCHELL, *Petitioner,*

v.

EDWARD A. MITCHELL, JR., *Respondent.*

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

WILLIAM F. KELLY
P. J. J. NICOLAIDES
RICHARD H. NICOLAIDES
CATHERINE B. KELLY
Counsel for Respondent
1511 K Street, N. W.
Washington 5, D. C.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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ARGUMENT.

The petition should be dismissed for the following reasons:

I.

Questions Presented.

There are no questions presented (a) of general importance or (b) relating to the construction or application of the Constitution, or a treaty or statute, of the United States which have not been, but should be, settled by this court, or (c) which indicate the lower court has failed to give proper effect to an applicable decision of this Court. Rule 38-5(c). (28 U. S. C. A. Rules page 68)

The decision of the United States Court of Appeals for the District of Columbia which was unanimous, was purely local. It decided:

(1) That extrinsic evidence is admissible to prove whether or not a latent ambiguity exists;

(2) That the extrinsic evidence offered disclosed a latent ambiguity did exist;

(3) That as a latent ambiguity was shown to exist, extrinsic evidence was admissible to remove the ambiguity;

(4) That when the whole will and extrinsic evidence are considered it is plain that the testatrix meant the respondent.

We shall now proceed to discuss each of the above points decided by the Court of Appeals.

(1)

That extrinsic evidence is admissible to prove whether or not a latent ambiguity exists.

While it does not appear in the decision below, nor in the petition, it would seem to be in order at this point to call the Court's attention to the fact that the District Court, without giving counsel an opportunity to argue the question, ruled in part as follows:

> ". . . the Court thinks there is nothing involved but a question of law. The Court thinks latent ambiguity must appear on the face of the paper. *If it does not appear on the face of the paper it is not latent ambiguity.*" (Rec. 83) (Italics supplied)

Citation of authorities that this was error hardly seems necessary, and it was because of this error that the District Court thereafter committed the error of striking out the extrinsic evidence that had been offered.

While innumerable authorities could be cited to support the decision of the Court of Appeals that extrinsic evidence

is admissible to prove whether or not a latent ambiguity exists, we shall confine ourselves to the decisions of this Court, the court below and Page on Wills.

In the case of *Patch* v. *White,* 117 U. S. 210, which originated in this district and involved the question of identity of property attempted to be conveyed, the Court said:

> "It is settled doctrine that, as a latent ambiguity is only disclosed by extrinsic evidence, it may be removed by extrinsic evidence. Such an ambiguity may arise upon a will, either when it names a person as the object of a gift, or a thing as the subject of it, and there are two persons or things that answer such name or description. . . . The first kind of ambiguity, where there are two persons or things equally answering the description, may be removed by any evidence that will have that effect, either circumstances, or declarations of the testator."

Further, the court stated:

> "Of course, in the case of a latent ambiguity such repugnancy can only appear by means of the evidence which discloses the ambiguity."

In Page on Wills (Lifetime Ed.), Vol. 4-626, the following statement is made:

> "The meaning and application of the terms of the will cannot be understood until the property and beneficiaries have been identified, which can only be done by extrinsic evidence, and in many instances, until the court understands testator's situation with reference to his property, the natural objects of his bounty and his contemplated beneficiaries."

Further, on page 629, is found the following statement:

> "While in some cases considerable stress is put on the fact that evidence is admissible because of the ambiguity of the will, this is because it is only in such cases that extrinsic evidence needs to be considered in construing the will; and in any case, whether the will appears ambiguous or not, the court is entitled to hear

such extrinsic evidence of the surrounding circumstances as will put it in the place of the testator. Until this is done, the court can not know whether the will is ambiguous or not."

In Page on Wills, *supra,* Vol. 2, page 819, the matter is stated as follows:

"How can we tell whether a will is clear and definite or ambiguous and uncertain until we know the surrounding facts?"

In the case of *Gilmer* v. *Stone,* 120 U. S. 586, which involved the question of the disposition of the residue, the lower court having received extrinsic evidence to show the situation of the testator and his relationship to the church claimants, this Court stated:

"Of the competency of this evidence there can be no doubt. The purpose of it was to place the court, as far as possible, in the situation in which the testator stood, and thus bring the words employed by him into contact with the circumstances attending the execution of the will. Such proof does not contradict the terms of that instrument, nor tend to wrest the words of the testator from their natural operation. It serves only to identify the institutions described by him as 'the board of foreign and the board of home missions;' and thus the court is enabled to avail itself of the light which the circumstances, in which the testator was placed at the time he made the will, would throw upon his intention. 'The law is not so unreasonable,' says Mr. Wigram, 'as to deny to the reader of an instrument the same light which the writer enjoyed.' Wigram on Wills, 2d Amer. Ed. 161. The proof made a case of latent ambiguity. Such an ambiguity may arise 'either when it names a person as the object of a gift or a thing as the subject of it, and there are two persons or things that answer such name or description; or, secondly, it may arise when the will contains a misdescription of the object or subject.' Patch v. White, 117 U. S. 210, 217. In the same case it was observed that, 'as a latent ambiguity is only disclosed by extrinsic evidence, *it may be removed by extrinsic evidence.*'" (Italics supplied)

In the case of *Kaiser* v. *Brandenberg,* 16 App. D. C. 310, which involved the construction of a will and in which the court found that there was not a latent ambiguity, the court did state as follows:

> "*Surrounding conditions and circumstances may be admissible in evidence as aids in arriving at the meaning of ambiguous words.* They are clearly so in order to explain ambiguities arising out of extrinsic circumstances, as to persons provided for, objects of description, and the like; but never to show a different intention in the testator from that which the will discloses." (Italics supplied)

In the recent case of *Baker* v. *National Savings & Trust Co.,* 86 U. S. App. D. C. 161; 181 F. (2d) 273; 78 W. L. R. 616, decided February 13, 1950, Judge Prettyman, speaking for the Court, stated:

> "If there are any indications in early opinions of this court that resort can never be had to extrinsic evidence to ascertain the intent of a testator, that impression has long since been dispelled."

(2)

That the extrinsic evidence offered disclosed a latent ambiguity did exist.

While this is possibly a question of fact, we nevertheless will point out wherein both the record and the authorities support this finding by the Court.

Before proceeding with argument on this point we believe it advisable to make certain observations concerning statements made in petitioner's brief.

On Page 9, the following statement is made:

> "She (testatrix) had in a *first* codicil, bequeathed one-half of her estate to a sister, one-fourth to a *grand-nephew,* Edward A. Mitchell, Jr., and one-fourth to a *niece,* a sister of Edward A. Mitchell, Jr. . . ." (Italics supplied)

The *first* codicil did not use the words *grand-nephew* and *niece.* In fact, the word *grand-nephew* was never shown to have been used by the testatrix in referring to the respondent.

In the *second* codicil the respondent's sister was referred to as a *niece,* when, as a matter of fact, she was the testatrix' *grand-niece.*

On Page 13, the following statement is made:

> "*Presumably* the sister was closer to the testatrix sentimentally as well as in relationship, than the grand-nephew and the grand-niece." (Italics supplied)

There is no justification for such a presumption. The record shows beyond a doubt that the respondent and his sister were the testatrix' chief concern, and that the relationship between the testatrix and the respondent and his sister was that of a mother toward two children. (Rec. 57)

On the same page the statement is made:

> "It is relevant to inquire how the testatrix could have provided for the petitioner in any other way."

The answer is very simple; in the same manner as the testatrix referred to him during her lifetime; by his Naval rank, (Rec. 42, 50, 55, 64) and as the District Court found it necessary to refer to the petitioner, "Edward A. Mitchell, in other words, *Admiral Mitchell,*" (Italics supplied). (Rec. 84). But aside from the foregoing the same argument has been advanced in other cases and has been disregarded as we shall point out hereafter.

We submit that based on the admission by way of the pleadings, the pre-trial stipulation and evidence presented, there was established the fact that the description "my nephew Edward A. Mitchell" could apply to both the petitioner and the respondent. First, with respect to the pleadings, there are two persons by the name of Edward A. Mitchell (Rec. 4, 8, 9); Edward A. Mitchell, the petitioner,

and his son, the respondent, who is also named Edward A. Mitchell.

By the pre-trial stipulation there are two persons who meet the description "my nephew Edward A. Mitchell." That the petitioner is the nephew of the testatrix is not in dispute, nor is it disputed that his son, the respondent, is, strictly speaking, the grand-nephew of the testatrix. Nor is there any dispute, in fact it was so stipulated by all the parties at the pre-trial proceedings (Rec. 21), that the respondent's sister, Mary M. Chewning, is strictly speaking the *grandniece* of the testatrix and the same person referred to in the second codicil by the testatrix as "my *niece* Mary A. Chewning." (Italics supplied.) It is apparent that the testatrix did not use the word "niece" in its strict legal sense, having used it to describe a grandniece. It is therefore obvious that the testatrix also did not use the word "nephew" in its strict legal sense, but also as meaning her grandnephew.

Next, let us consider the evidence with respect to the manner in which the testatrix considered the relationship which existed between herself and the respondent. The respondent produced seven witnesses: Bruce Baird, the executor of the testatrix' estate and her business advisor; J. Fontaine Hall, Trust Officer of the National Savings and Trust Company; Mabel E. Moore, an employee of the testatrix' for a number of years; Josephine Walker, employed in the home of the testatrix for the year just prior to her death; Cyril Verdunck, an employee of the testatrix for over 20 years; the respondent's sister and her husband, all of whom testified that the testatrix had always referred to the respondent as her nephew and that at no time had she ever referred to him as her grandnephew (Rec. 54, 50, 45, 42, 64, 59, 69). There was no evidence to the contrary, and the petitioner himself, when testifying, did not deny that the testatrix at all times referred to and considered the respondent her nephew.

Wigram, Treatise on Extrinsic Evidence in Aid of the Interpretation of Wills, (2d Amer. Ed.) Page 59, states as follows:

> "The second branch of the proposition may be as briefly disposed of. For where it appears upon the face of the will that the testator has used particular words in this or that particular sense, no adequate reason could possibly be assigned for rejecting the sense (however inaccurate) in which the *testator himself thus declares* he has used them. *In such cases, therefore, a departure from the strict and primary sense of the words, in favor of the testator's intention, is properly and indeed necessarily permitted.*" (Italics supplied)

In the case of *Crenshaw* v. *McCormack,* 19 App. D. C. 494, which involved the question of whether after-acquired property passed under a will, the court said in part:

> " . . . that a testator is always presumed to use the words in which he expresses himself according to their strict and primary acceptation, *unless from the context of the will,* it appears that he has used them in a different sense, in which case the sense in which he thus appears to have used them will be the sense in which they are to be construed."

In the case of *James* v. *Smith,* 14 Simmons 214; 60 English Reports (Reprint) 339, the testatrix referred several times in her will to her "nieces" so and so, when, in fact, such persons were grandnieces. By the residuary clause of her will the estate was to be divided between her nieces and nephews. The Court, in construing the residuary clause, stated in part as follows:

> "So that in three instances she has described persons as nieces, who, in fact, were the children of a nephew and niece. Consequently she has shewn unequivocably that she meant the child of a nephew or a niece as well as a niece or nephew . . . *I take the word 'nieces' to mean only what the testatrix shews she intended it to mean, namely the daughters of her nephews and*

nieces. If by that word she meant nieces in the second degree, it necessarily follows that by the word 'nephews' she meant nephews in the same degree." (Italics supplied)

In the case of *Robertson* v. *Burnett,* 155 N. E. 178 (1927), the testator left a certain sum of money to Mrs. James M. Sinclair, who was a grandniece. He then directed that his estate be divided in a certain manner among his nephews and nieces, with the exception of Mrs. James M. Sinclair, who had heretofore been named in paragraph 3 of the will. The question was whether the grandnieces and grandnephews should share with the nieces and nephews. The court held it was clear that they did as if the testator had only meant nieces and nephews were to share, then there would have been no necessity to have excluded Mrs. James M. Sinclair who was a grandniece.

In the case of *In re Davis,* 35 Atl. 1046; 19 R. I. 654, the testator provided $1,000.00 was to be paid to each of three nieces, "the daughters of my deceased sister." The sister never had any daughters, but did have three granddaughters, children of a deceased son. The residuary legatees claimed that there was no one to fit the description of niece and they were entitled to the money. The court denied their claim and said:

> "But it is also well settled that a misnomer of a legatee or devisee is immaterial if the person intended can be identified by the description in the will. ...
> *"The omission of the prefix 'grand' is by no means so uncommon or unnatural as to lead us to doubt that he meant the grandnieces."* (Italics supplied)

In the case of *Palmer* v. *Munsell,* 46 Atl. 1094 (N. J.), the testator had a niece by the name of Jane Wackenbarth, who, in turn, had two daughters, Alice Wackenbarth and Jennie Wackenbarth, who were grandieces of the testator and lived in New Orleans. By his will he left $2,000.00 to Alice Wackenbarth, whom he designated as his niece, and then a bequest of $2,000.00 to "my niece ——— Wacken-

barth in New Orleans." The court held there was a latent ambiguity and stated in part as follows:

> "... but any value which the use of the word 'niece' would have, as an aid in the identification of the legatee disappears when the fact is shown that the immediately preceding named legatee is Alice, who is also a grandniece, but who is styled by the testator as his niece. It therefore appears that the testator did not have in mind a distinction between 'niece' and 'grandniece.' *Had there been no bequest to Alice*, I would have had no doubt that he intended the gift for his niece Jane. But the fact that there is a gift to Alice describing her as his niece of $2000, followed immediately by a gift to ——— as his niece of the same sum, leads me to the conclusion that he meant Jennie, the sister of Alice. I will so advise." (Italics supplied)

In the case of *In re Horton's Estate*, 68 Atl. (2d) 658 (N. J.), decided in 1949, the testatrix had four nephews and nieces and eight grandnephews and grandnieces of her own blood, and three nephews and nieces and fourteen grandnephews and grandnieces by marriage. The testatrix provided that the residue of her estate should be divided "equally among such of my nieces and nephews that shall survive me." In another part of her will she had appointed her attorney and "my nephew, Melville H. Westcott" as executors of her estate. The said Melville H. Westcott was not a nephew of the testatrix, but was in fact a grandnephew of her deceased husband. The court said:

> "At first blush it seemed that nothing about the will required construction. However, it appears that the Melville H. Westcott appointed executor in the third paragraph of the will and referred to therein as 'my nephew, Melville H. Westcott' is, in fact, not a nephew but a grandnephew of Mrs. Horton's deceased husband. The executors disclose their uncertainty as to the identity of the residuary beneficiaries and ask the instructions of the Court on the following points:

"1. Did the decedent intend, by her reference in the will to Dr. Westcott as 'my nephew' to include him as as a beneficiary under the residuary clause?
"2. Did the testatrix intend to include as beneficiaries under the residuary clause, her other grandnieces and grandnephews by blood and by marriage?
"Here we have presented a latent ambiguity for the explanation of which extrinsic evidence is admissible. ... *In the construction of wills the primary and important task is to determine the intention of the testator.* And, while extrinsic evidence may not be used to supply an intention, it may be used to explain an intention expressed in the will. ... And the reason for the reception of such evidence is to place the Court in the situation in which the testatrix was at the time she executed the will." (Italics supplied)

In the case of *Baldwin's Co-Executors* v. *Curry,* 115 S. W. (2d) 333, 272 Ky. 827, the testator gave $500.00 to Mrs. Lucinda T. Morrison, designating her "his niece." He provided that the residue of his estate should be divided "among my nieces and nephews named hereinbefore, share and share alike." The court held that although Mrs. Morrison was a niece by marriage, she and the other nieces and nephews by marriage should also share, and stated:

"Generally speaking and as indicated by authorities cited, nieces and nephews mean the immediate descendants of brothers and sisters of a testator and do not include nieces and nephews by marriage unless such intention appears or is expressed by the will as a whole. Since testator twice referred to Mrs. Morrison as 'my niece' in clauses preceding the eighth, the conclusion is inescapable from a consideration of the will as a whole that he had her in mind as such when he made disposition of the residue of his estate by that clause."

In the case of *Grant* v. *Grant,* 18 W. R. 20, 39 L. J. N. S. (C. P.) 140; L. R. 5 C. P. 380 (Eng.) (1870), the testator had devised certain property to "my nephew Joseph

Grant." He had a nephew named Joseph Grant, who was the plaintiff, and his wife had a nephew named Joseph Grant, who was the defendant. The question was first, did a latent ambiguity exist, and second, if so, who was the beneficiary intended to take. The lower court decided that a latent ambiguity did exist and stated in part as follows:

> "The plaintiff's evidence in the present case clearly brought him within the description in the will. The defendant's evidence proved that he was the son of a brother of testator's wife, and the testator having married his first cousin of the same name as himself, the defendant's name was the same as that of plaintiff. Does then the defendant by this evidence shew that the description will apply to him? It is quite true that a son of a brother or a sister is generally called and known as a nephew, and this term therefore would no doubt apply to the plaintiff, *but the word 'nephew' has no definite legal signification, and there is not anything to limit its application to the precise relationship above described; on the contrary, there are many authorities to shew that it has been and may be used in a much wider sense, extending to persons in a different degree of relationship; and in its ordinary and popular sense it is frequently and commonly applied to other persons: for instance, it is commonly applied by a husband to the son of his wife's brother or sister, or by a wife to the son of her husband's brother or sister; the son of either of such brothers or sisters would commonly call the husband and wife his uncle and aunt, nor could it be said that in popular and ordinary language such a description would be unusual or inappropriate.* It is the Court which has to be satisfied that the description may apply to the defendant, and if it rested on this evidence alone, we should be of opinion that the defendant had brought himself within the description of the will so as to create a latent ambiguity, and to let in further parol evidence as to which of the two parties was intended to be described.
>
> "It is not necessary that the description in the will should be in all respects accurate or perfect, but it is sufficient if it satisfies the mind of the Judge that there

is a sufficient description with legal certainty." (Italics supplied)

The evidence showed that the testator was in the habit of calling the defendant his nephew to members of his family and persons not related to him, and with reference thereto the court stated as follows:

> "But there is another ground upon which it appears to us that the defendant may endeavor to bring himself within the description in the will, viz, the testator was *in the habit of calling him* his nephew Joseph Grant."

On appeal there were several separate opinions, all of which affirmed the judgment of the lower court and are found in the same volumes on pages 272 and 727 respectively. Judge Kelly stated in part as follows:

> "Now there can be no doubt that there is a latent ambiguity, and the question is whether on its appearing that there are two persons answering, in different senses, to the word 'nephew', evidence is admissible to shew which the testator meant. *As to the term 'nephew' we cannot deny, by using our knowledge of the English language, that each may, without violation of its meaning, come within the term.* It is true that perhaps the more strict and original sense is a brother's or sister's son, but at this time the term is, and when the will was made and the testator died, it had been applied in an ordinary and popular sense, just as much to a wife's brother's son as to a brother's son. And where, therefore, there are two meanings the question is, are we not to go into evidence to see which was intended? It has been argued that there are different degrees of the application of the word, and cases have been cited to shew that if there be some thing in existence to which a term strictly applies we can go no further, and can not go into evidence to shew that the term was used in what is a secondary meaning. But we must distinguish between the case where an estate is described in a will, and we must go into evidence to see what it is and where the term 'nephew' is used which the Court itself can construe,

and is quite as capable of construing, as to whether it has one or two meanings, without evidence as with the help of evidence or authority." (Italics supplied)

Judge Cleasby's opinion was in part as follows:

> "It is plain if there were no other nephew than the defendant he would take as nephew; and that the words would also carry the property to the plaintiff if he were the only one; the same words have the same effect, as to the one or the other, and I can not conceive a greater case of latent ambiguity; *they carry equally to either in the absence of the other;* there is a latent ambiguity, and, therefore, parol evidence is necessary, and that evidence solves the question." (Italics supplied)

In the case of *Grant and Grant* v. *Grant,* 21 The Law Times Reports, N. S., 645; 2 Probate and Divorce 8 (Eng.), the same will was before the court for construction as in the case of *Grant* v. *Grant, supra,* the testator having named his nephew Joseph Grant as executor and the question being who should be appointed executor of the estate. That court also held that the testator's wife's nephew was the one intended by the testator rather than his own nephew. The court, in referring to the admissibility of parol evidence to ascertain which of the two claimants the testator meant, stated in part as follows:

> ". . . it is clear that if this field of inquiry is once entered upon, the facts will abundantly show that his wife's nephew, who lived with him, and not his own nephew, with whom he had no intimacy, was the person intended. But here it is contended that the word 'nephew' cannot possibly be construed to include the nephew of the testator's wife. It is said that the court is bound by the primary signification of words used in a will, and that nothing but the primary signification in its strictest sense can be resorted to, unless that signification would produce some absurdity or render the meaning insensible."

* * * * *

"When a man makes a will, *it is right to presume that he uses ordinary language in its ordinary sense; and if the original signification of a word is scrupulously followed in all cases, to the exclusion of that which by the common consent and use of mankind it had in process of time acquired, the court would be carried in some cases a long way from the testator's intention in the endeavor strictly to follow it.*" (Italics supplied)

* * * * *

"It may be that the testator has been in the habit of applying a particular designation to an individual, and if the evidence may be referred to, it is plain in this case that the testator did constantly use the word 'nephew' to designate his wife's nephew. *If this designation, then so used, is not at variance with its ordinary and popular meaning, it seems unreasonable to reject it wholly in favor of some primary meaning which excludes that individual.*" (Italics supplied)

In the case of *Northern Trust Co.* v. *Perry,* 168 Atl. 710 (Vt.) (1933), the question involved was whether a father or son was the person to take under a will. The description of the legatee in the will was "Albert Perry of Vermont." The father's name was Albert Perry. The son's full name was Albert George Perry. Both were of Vermont. The position of the plaintiff was that as the description exactly fitted the father and did not exactly fit the son, no parol evidence was admissible to establish that the son was the person intended to take, and that it must be taken that the will referred to the father. The court held there was a latent ambiguity and that parol evidence was admissible to identify which of the two parties the testator made beneficiary under his will, and further found from the evidence that the son was the intended beneficiary. The opinion states in part as follows:

"We do not regard it necessary that the name and description given in the will shall equally or exactly check with all the rival claimants. It is enough, we think, that the name and description are substantially

applicable to two or more persons. In such cases, a latent ambiguity exists, which, being created by parol, may be removed by parol."

(3)

That as a latent ambiguity was shown to exist, extrinsic evidence was admissible to remove the ambiguity.

Wigram, *supra,* pages 56-57, states the proposition as follows:

> "For the purpose of determining the object of the testator's bounty, or the subject of disposition, or the quantity of interest intended to be given by his will, *a Court may inquire into every material fact relating to the person who claims to be interested under the will,* and to the property which is claimed as the subject of disposition, *and to the circumstances of the testator and his family and affairs; for the purpose of enabling the Court to identify the person or thing intended by the testator,* or to determine the quantity of interest he has given by his will." . . .
>
> "These cases may be thus defined: *where the object of a testator's bounty,* or the subject of disposition (i.e. the *person* or *thing* intended), is described in terms which are applicable indifferently *to more than one person* or thing, *evidence is admissible to prove which of the persons* or things so *described was intended by the testator.*" (Italics supplied)

On pages 148-149 the following statements are made:

> "As a knowledge of the nature, name, etc., of the subject intended by the testator is necessary for the purpose of enabling a Court to identify it; *so, a knowledge of the circumstances by which a testator was surrounded at the time of making his will; the situation in which he stood with respect to the objects to which his will refers; and, generally, a knowledge of the state and circumstances of the testator, his family, and affairs may be necessary for the same purpose.*" . . .
>
> "Again, suppose a testator to devise an estate to AB, there being two persons, father and son, of the same

name, and that the son only was known to the testator; . . . The meaning of the testator's words in both these cases, though equivocal in the abstract, is definite with reference to the circumstances under which they were used." (Italics supplied)

On page 233 the following statement is made:

"With respect to the particular evidence which is admissible for the purpose of determining which of several subjects was intended by the testator,—where the description in the will is applicable to more than one subject,—as the question in such cases is, what the testator *intended* to have expressed; *any evidence, which upon general principles is relevant and material to that inquiry, will be admissible.*" (Italics supplied)

Jarman on Wills (5th Ed.), page 430, states as follows:

"Suppose then that evidence has been given of all the material facts and circumstances of the case, and that these have ultimately raised an ambiguity by disclosing the existence of more than one object or subject to which the words are equally applicable. The uncertainty as to which of these was in the testator's contemplation would, if the investigation stopped here, necessarily be fatal to the gift. [*Under these peculiar circumstances, however, declarations of the testator or other direct evidence of his intention are admissible*] *to clear up the ambiguity, by pointing out* (*if they can*) *the actual subject or object of gift, among the several properties or persons answering to the description.*" . . . (Italics supplied)

Page on Wills, *supra,* Vol. 4, states the proposition as follows:

"Where the description of the beneficiary is ambiguous, the court allows considerable latitude in the admission of extrinsic evidence to identify such beneficiary, although such evidence cannot be used to contradict the terms of the will.

"If the description applies completely to a certain person or persons and to no others, evidence may not

be received to show that the testator intended the gift to be to others, even if it is claimed that a mistake was made in drafting the will, but if the description can apply to either of two or more persons, parol evidence, even as to declarations of the testator, is admissible to determine which was intended." (p. 643)

* * * * * * * * * *

"Among the surrounding facts admitted in evidence we find that the most usual relate to the amount, character, and productivity of the testator's property, and the *relationship* between him and the natural objects of his bounty, and between him and other persons who claim under the will or who might be benefited thereby. *The Court may consider not only facts showing the state of the testator's affection towards possible objects of his bounty, but also their circumstances, such as age, need, dependents, or lack thereof.*" (p. 657)

* * * * * * * * * *

"If the provisions of the will are found to apply equally to two or more persons or things, evidence of testator's actual intention as shown by his declarations and the like is admissible. Such evidence may be introduced in evidence to identify the property or the beneficiaries." (p. 669) (Italics supplied)

In the case of *Grant* v. *Grant, supra,* where the testator left certain property to his "nephew Joseph Grant" and it was shown that he had a nephew of that name and his wife also had a nephew of that name, and the court held there was a latent ambiguity, the court said:

". . . the further parol evidence as to the *testator's knowledge, and other circumstances,* became admissible and upon such of that evidence as was properly admissible it is not disputed that the defendant was in fact the person intended to be described by the testator." (Italics supplied)

On appeal Judge Kelly referred to the fact that the defendant (the wife's nephew) had been brought up by the testator as a member of his family, had assisted testator in

his business, and had long been the object of the testator's affection and regard.

In the case of *Powell* v. *Biddle,* 2 U. S. (2 Dallas) 69, a bequest was left to "Samuel Powell." There was a Samuel Powell, son of testator's deceased daughter. There was also another son by another marriage by the name of "William Powell." William claimed the bequest. The court admitted evidence to show the testator called William by the name of Samuel; that he knew William well but did not know Samuel, and on this point this Court stated:

> "The bequest was made to a person who was always called *Samuel* by the testator, though, in fact named *William;* and whom testator had nurtured and educated from his infancy; when on the other hand he did not even know the person really called Samuel. The evidence to explain those facts was proper to be laid before the jury; and their verdict perfectly accords with the law and equity of the case."

In the case of *Smith* v. *Bell,* 31 U. S. (6 Peters) 68, this Court in referring to ambiguities stated as follows:

> "In the construction of ambiguous expressions, the *situation of the parties* may very properly be taken into view. The ties which connect the testator with his legatees, *the affection subsisting between them,* the motives which may reasonably be supposed to operate with him, and to influence him in the disposition of his property, *are all entitled to consideration* in expounding doubtful words, and ascertaining the meaning in which the testator used them." (Italics supplied)

In the case of *Wilkins* v. *Allen,* 59 U. S. (18 Howard) 385, this Court makes the following statement:

> "That the court may put itself in the place of the testator, by looking into the state of his property, and the circumstances by which he was surrounded when he made the will, is not only true as a general proposition, but without such information it must often happen that the will could not be sensibly construed. Wigram (10, 60) lays down the rule with much dis-

> tinctness. Such evidence, however, is only admissible to explain ambiguities arising out of extrinsic circumstances, *as to persons provided for, objects of disposition, and the like.* For instance, if the testator gave to his grandson, J. S., a plantation, and he had two grandsons of that name; or he devised his son J his plantation on a certain river, and he had two plantations there—in each case proof might be heard to show the person or thing intended. But evidence cannot be heard to show a different intention in the testator from that which the will discloses." (Italics supplied)

In the case of *Patch* v. *White, supra,* which involved the question of a latent ambiguity as to the description of a piece of property and in which case the court found a latent ambiguity did exist, this Court stated in part:

> "In such case evidence is always admissible to show the condition of the testator's family and estate, and the circumstances by which he was surrounded at the time of making his will."

In the case of *Barber* v. *Pittsburgh, Fort Wayne & Chicago Railway Company,* 166 U. S. 83, this Court said with respect to ambiguities as follows:

> "Evidence of extrinsic circumstances, *such as the testator's relation to persons,* or the amount and condition of his estate, may be admitted to explain ambiguities of description in the will but never to control the construction or extent of devises therein contained. As said by this court, speaking by Mr. Justice Grier: 'A court may look beyond the face of the will where there is an ambiguity *as to the person* or property to which it is applicable, but no case can be found where such testimony has been introduced to enlarge or diminish the estate devised.' King v. Ackerman, 2 Black 408, 418." (Italics supplied)

(4)

That when the whole will and extrinsic evidence are considered it is plain that the testatrix meant the respondent.

Here again we have possibly a question of fact, but we will nevertheless point out wherein the record supports this finding by the court.

As under Point (2), before proceeding with argument under this point, we believe it advisable to make certain observations concerning statements contained in petitioner's brief.

On pages 16 and 17 the petitioner quotes from certain testimony of the witness Tyler upon cross-examination, but he fails to quote the following:

> "Q. Mr. Tyler, what were you told with respect to the persons who were to be named in the second codicil with relation to the persons named in the 1st codicil?"
> "A. I was told they were the same people. I never heard of any other than the one gentleman that was named." (Rec. 38)

On page 17 the following statement is made: one of the servants of the testatrix testified that the testatrix during the last year of her life had often said she wanted the *grand-nephew* and the *grand-niece* "to have her lovely things because they would appreciate them."

The record will disclose that the witness did not say anything whatsoever about a grand-nephew and grand-niece. What the witness said was that the testatrix "wanted her *niece* Mary and her *nephew*, Ned, to have her lovely thing because they would appreciate them." (Rec. 43). (Italics supplied)

On page 18 reference is made to the testimony of the witness Hall, but it fails to quote from his testimony as follows:

> "Q. What did Mrs. Blair say to you with reference to the preparation of the second codicil?"

> "A. She wished to leave her niece, Mary Chewning, and her nephew, Edward A. Mitchell, one-third of her household furnishings, in effect." (Rec. 50)

On the same page the statement is made that:

> "... if the testatrix was providing for the petitioner under the second codicil he would receive property of a value of approximately $14,000.00. On the other hand, if the respondent is held to be the person intended in the second codicil, his share in the estate is increased by approximately only $3500.00."

This is not a fact, as it must be quite obvious that if it is held that the respondent is the person intended in the second codicil his share would be increased to the same extent as the petitioner's share would have been, namely, approximately $14,000.00.

On page 19 petitioner states:

> "It is hardly reasonable to assume that the testatrix who was leaving the grand-nephew in any event property of a value of approximately $53,000.00, would have changed her will by a codicil to increase the grand-nephew's share in the least valuable assets of her estate by a mere $3500.00"

The fact of the matter is, and it is admitted by all parties, that that is exactly what the testatrix did with respect to the respondent's sister's share in the estate.

It would probably be more correct to say that it is hardly reasonable to assume that the testatrix would have increased the share of her estate that was to go to the repondent's sister and not at the same time increase the share that was to go to the respondent.

On page 20, the statement is made that in the testimony offered by the respondent he was endeavoring to show that his father, the petitioner, was disliked by the testatrix, therefore she was not likely to remember him in her will.

The fact of the matter is the respondent did not give one word of testimony as indicated above. (Rec. 69-74).

On the same page, petitioner refers to defendant's Exhibit 3 (Rec. 105), wherein the testatrix in her own handwriting struck out the name of Mr. Fred S. Tyler and wrote in the margin, Edward A. Mitchell, Jr., but he neglects to state that the repondent's testimony with reference thereto was as follows:

> "May I state that I was present when she signed the document? It took place after the conversation with Mr. Baird. At that time I handed her the document and directed her as to where to place her name and *what to write.*" (Rec. 73). (Italics supplied)

This brings us to an inquiry as to the facts relating to the claimants herein; the circumstances of the testatrix; the objects of her bounty; her declarations and respective affections towards the parties, and circumstances such as age and need.

First let us consider the facts about which there is no dispute. Prior to the execution of the second codicil the respondent and his sister, Mary M. Chewning, were each to receive a one-fourth interest in the entire estate, which, of course, included the property mentioned in the second codicil. By said second codicil the interest of the respondent's sister, Mary M. Chewning, in the property mentioned therein, was increased from one-fourth to one-third. The only question is whether by said second codicil the respondent's interest in the property mentioned therein was also increased from one-fourth to one-third, or whether he was left out entirely as to said property and his father substituted in his stead. At this point it might be well to call the Court's attention to the testimony of the plaintiff, who was the executor of the testatrix' estate and her business advisor, and which testimony has not been disputed, that the testatrix told him at or about the time she was going to make the second codicil that she intended to enlarge the shares that were to go to the respondent and his sister (Rec. 56). Further, that the witness Hall, who was the Trust

Officer of the National Savings and Trust Company and to whom the testatrix had given instructions with reference to the contents of the second codicil, testified that the testatrix thereby intended her will to be changed so that her niece, Mary Chewning, would receive one-third and her nephew, Edward A. Mitchell, one-third of the personal property (Rec. 50).

Now, with respect to the claimants under the second codicil, on the one hand we have the petitioner who was a lifetime officer in the United States Navy and at the time the codicil was executed was a Captain on active duty in the United States Navy. At the time of the trial he was a retired Admiral thereof, receiving pay as such (Rec. 75), and in addition thereto, was receiving from $4500 to $4700 from his father's estate (Rec. 81). So far as he knew he was on the best of terms with the testatrix (Rec. 79). He stated she called him her favorite nephew and was always fond of him (Rec. 80). That he made reasonably frequent visits to the testatrix' home (Rec. 61). From the foregoing it can hardly be said that the petitioner was very close to the testatrix or that she evidenced for him a very affectionate feeling, or that she was interested in his financial welfare. She had six other nephews and four nieces (Rec. 13) none of whom were mentioned in her will or codicils, and what reason do we have to believe that she was more interested in the petitioner, than her other nieces and nephews, except his own statement that she called him her favorite nephew?

His own mother, by her will, had not left him anything ". . . in view of the fact that he was adequately provided for by the United States Navy and as a life tenant under his father's will he will receive the income thereunder" (Rec. 81-82). While not in the record herein, but in the same will, of which the trial court took judicial notice (Rec. 82), the petitioner's mother left her estate in trust for the respondent and his sister and their children.

On the other hand we have the respondent, a young man about 25 years of age, employed as a clerk in the Riggs National Bank and going to law school at night (Rec. 58). The testatrix was extremely fond of the respondent and his sister and wished them to come and live with her when their mother died (Rec. 62). They did come and live with her in 1930 when they were about 5 years old (Rec. 58) and thereafter it was their home with the exception of 2 winters (Rec. 65). The respondent and his sister continued to live with the testatrix. He left to enter the Navy, and while in the Navy married, and after his discharge went back to live with the testatrix until he was able to find an apartment (Rec. 70). Thereafter he visited the testatrix nearly every day (Rec. 41, 58), and he and his wife often had dinners there (Rec. 71). During the testatrix' last illness, at her request, he attended to her business matters for her, such as going to the bank, seeing Mr. Baird, and going in her safe deposit box (Rec. 71). From time to time she gave him money, the last gift being in December 1947, at which time she gave him $500.00 (Rec. 93-104). The relationship between the testatrix and the respondent and his sister was that of a mother towards two children (Rec. 57). She gave him $100.00 per month to pay his rent (Rec. 45). She had stated she would die happy if she knew respondent and his sister were taken care of as they had been when they were in her home (Rec. 46). After Mrs. Mary Alexander Mitchell, the petitioner's mother, died in the summer of 1946, the testatrix was anxious to get back to Washington to be sure the respondent and his sister received Mrs. Mitchell's share of her estate (Rec. 47). The testatrix had stated that she had to have the children taken care of so she could die in peace (Rec. 49). The testatrix had stated she wanted respondent and his sister to have her lovely things; that the respondent was a young man struggling to get ahead and she had to take care of him (Rec. 43).

It is respectfully submitted that the foregoing shows beyond a shadow of a doubt that it was to the respondent that the testatrix was referring when she stated in the second codicil "my nephew Edward A. Mitchell." There was offered no evidence whatsoever in contradiction of the evidence offered by the respondent with respect to the affectionate relationship which existed between the testatrix and the respondent and his sister. That the testatrix was interested in the welfare of the respondent and not that of the petitioner can be hardly doubted.

There was no testimony offered in this case by the petitioner other than his own statements and at no time has he denied the close affectionate relationship which existed between the testatrix and the respondent, in fact he testified himself that the testatrix was extremely fond of the respondent and always expressed a desire to do everything for him (Rec. 78).

This long close affectionate relationship, like that of a mother toward a son, when taken into consideration with the first codicil which gave the respondent one-fourth of her estate and the words in the second codicil where the testatrix designates the respondent's sister as her niece, clearly shows that the respondent and not the petitioner was the person designated in the second codicil.

II.

Analysis of Remaining Authorities Relied Upon by Petitioner.

While the petitioner cites numerous other authorities in support of his contentions, he does not point out wherein those authorities do in fact support his contentions and an examination thereof discloses that they are not applicable to the present case.

The case of *Lipphard* v. *Humphrey*, 209 U. S. 264, 28 Sup. Ct. 561, was a will contest. There was no question of an ambiguity involved. The real question was whether in-

ability to read, it not being affirmatively shown that the testatrix had the will read to her, raised a presumption that she had read it. The jury found that the testatrix did know the contents of the will. The evidence which the trial court excluded was not for the purpose of identifying the beneficiary, but for the purpose of attempting to show what the testatrix had stated she was going to do with reference to her will.

The case of *Buchanan* v. *National Savings & Trust Company*, 57 App. D. C. 386; 23 F. (2d) 994, was a bill in equity by an executor for instructions as to whether certain cash dividends declared prior to death but paid subsequently thereto should be held as part of the corpus of the estate or treated as income. The Court in the course of its opinion, stated in part as follows:

> "The intent of the testator, to be gathered from the language used in his will and *the situations and circumstances surrounding him*, must control the determination of the question involved." (Italics supplied)
>
> ". . . the object being to give the court the point of view of the testator as an aid in the interpretation of the language used by him."

The case of *American Security & Trust Company* v. *Blair*, 63 App. D. C. 170; 70 F. (2d) 774, involved the question as to whether certain excess income was to be held by the trustees or distributed to a grandson. There was not involved in the case any question concerning extrinsic evidence. The court's ruling was that the lower court had committed error in construing the language of the will.

The case of *Association of Survivors of Seventh Georgia Regiment* v. *Larner*, 55 App. D. C. 156; 3 F. (2d) 201, was a suit to determine the identity of an association named in a will. The Court held that the evidence left no doubt as to what association was intended. The Court in the course of its opinion, stated in part as follows:

> "Where, also, a will contains an actual misdescription of an object or subject, and from other provisions

> of the will the real intention of the testator is made to appear the introduction of extrinsic evidence in such a case merely aids the Court in harmonizing all the provisions of the will."

The case of *Utermehle* v. *Normant,* 22 App. D. C. 31, was a suit to determine the validity of a will. During the course of the trial the caveator offered evidence that the testator had on one or two occasions stated to the caveator that if he would not take sides in certain legal proceedings the testator would leave the caveator a certain share of his estate. The Court held such evidence was not admissible on the authority of *Throckmorton* v. *Holt,* 180 U. S. 552.

The case of *Dawson* v. *Waggaman,* 23 App. D. C. 428, was an action in replevin to obtain possession of certain real estate notes, which by the terms of the last will of the testatrix had been bequeathed in trust to appellee. The appellant claimed that the testatrix had given the notes to him the evening before her death; the witness testified that the testatrix handed the notes to his wife stating she had invested the money for her to buy a home, and that the wife thereupon handed the notes to the witness. The Appellate Court ruled the evidence was inadmissible under Section 1064 of the Code, which provides that where one person to a transaction has died the other party thereto shall not be allowed to testify in regard to the same transaction.

The case of *Mayo* v. *Whedon,* 47 App. D. C. 138, involved the meaning of the term "face value." The testatrix had bequeathed to each of the appellants certain railroad bonds having a "face value" of $1000.00. The appraisal of the bonds in question happened to be less than the "face value". The appellants' contention was that they were entitled to receive bonds of an actual value of $1000.00. The decision of the lower court was affirmed, the Appellate Court stating in part as follows:

> "About the meaning of the phrase, 'face value' there is no ambiguity."

The case of *Fersinger* v. *Martin,* 183 Md. 135; 36 Atl. (2d) 716, was a bill to construe a will and determine the rights of respective parties. The wife contended that the will indicated an absolute devise, while her daughter and son contended that there was only a life estate, and that an ambiguity arose.

The devise was:

> "I give and bequeath to my wife, Belle H. Fersinger, all of my personal property and real estate, to have and to hold as her own during her lifetime."

The wife offered testimony of the draftsman of the will (not an attorney) as to instructions given him by the testator. Objection was made to the testimony on the grounds that a certain provision of the Maryland Code provided that:

> ". . . no party to the cause shall be allowed to testify as to any transaction had with, or statement made by the testator . . ."

The lower court decided the wife received a life estate only. Upon appeal, the decree was affirmed and the court in the course of its opinion stated in part as follows:

> "To the general rule that no expression as to the intention of the testator or parol evidence may be considered is an important limitation where there is a latent ambiguity in the words of the will (authority cited). The only object and purpose for which extrinsic proof can be admitted properly is to show what is the meaning of his words."

The case of *Decker* v. *Decker,* 121 Ill. 341; 12 N. E. 570, was an appeal from a decree giving construction to a last will. The testator devised certain lands in a certain section that he did not own, but he did own other land in the same section. Claim was made that a latent ambiguity existed and the court in the course of its opinion stated as follows:

"While the general rule undoubtedly is that the intention of the testator is to be gathered from an inspection and consideration of the will and from no other source, in case of latent ambiguity, courts do and *must* listen to extrinsic evidence,—not for the purpose of contradicting or adding to the terms of the will, nor to wrest the words of the testator from their natural operation, but for the purpose of determining the existence or non-existence of latent ambiguity, for a latent ambiguity can only be shown by extrinsic evidence, and for the further purpose of enabling the Court to look upon the will in the light of the facts and circumstances surrounding the testator at the time the will was made whereby to determine the intention of the testator. . . It is further to be observed that, as a latent ambiguity is only disclosed by extrinsic evidence, it follows that, if removable at all, it may be removed by extrinsic evidence." (Italics supplied)

In the case of *Mahoney* v. *Grainger,* 283 Mass. 189; 186 N. E. 86, the will left all the rest and residue of the estate to the testator's "heirs at law living at the time of my decease, absolutely, to be divided among them equally, share and share alike."

The testator actually left but one heir at law, an aunt, but did leave several cousins. She had left considerable sums to two of her cousins. Evidence was sought to be admitted to show that 10 days before her death she sent for her attorney and wanted to make a will. When asked to whom she wanted the residue of her estate to go she stated that she had about twenty-five cousins, and to let them share it equally.

The attorney drafted the will and read it to her and she executed it.

The trial court ruled that the statements of the testatrix ". . . were admissable only so far as they tended to give evidence of the material circumstances surrounding the testatrix at the time of the execution of the will, that the words 'heirs at law' were words in common use, susceptible of application to one or many, that when applied to the

special circumstances of this case that testatrix had but one heir, notwithstanding the added words, 'to be divided among them equally, share and share alike.' There was no latent ambiguity or equivocation in the will itself which would permit of the introduction of the statements of the testatrix to prove her testamentary intention."

The decision of the lower court was affirmed.

In the case of *Lincoln* v. *Perry,* 149 Mass. 368; 21 N. E. 671, a bill was brought by a trustee to determine who were the persons entitled to take under a will. A devise of one-fourth of the residue was made to Judith Perry for life, and upon her death to her heirs at law. The testator was domiciled in Massachusetts where the will was executed, and where he died. Judith Perry was domiciled in New Hampshire, where she had lived over thirty years. The residue consisted of personal property in Massachusetts and a piece of real property in New Hampshire. The question before the courts was the disposition of the personal property given by the residuary clause that is, whether it should go to the heirs at law, as provided by the laws of Massachusetts or as provided by the laws of New Hampshire.

The court held that the property was to go to the heirs at law according to the laws of Massachusetts.

In the case of *Smith* v. *American Missionary Association,* 240 Mass. 26; 132 N. E. 358, the deceased left legacies to several corporations and several legatees as individuals. She left the residue of her estate to "all of the above named legatees living at the time of my death." The question was whether the corporations shared in the residue. The court held:

> "The word 'living' in common speech is not confined to individuals. It is applicable to things as well. We even speak of our language as a living language."

The court further held that there was no ambiguity in the will and that its meaning was clear and evidence of declara-

tions of the testatrix as to her views of the meaning of the language employed was inadmissible.

The case of *Jackson* v. *Sill,* 11 Johnson's (N. Y.) 201, decided in 1813, was an action in ejectment. The testator left to his wife certain real estate which he described as "the farm which I now occupy, together with the whole crops of every description which may be thereon, at the time of my death, whether standing or growing on the land, or have been gathered into my barns."

The piece of property in question at the time the will was made and at the time of death was under lease by the testator to one Salisburg for a term of seven years. Evidence was offered to show that the testator intended the property to go to his wife. The will was drawn under a misapprehension of the true facts, and under the belief that the testator was in occupation of the property. The court held that a latent ambiguity did not exist, as it was clear from the will that the only property passing thereunder was the property actually occupied by the testator. It pointed out that it would be nonsense to say that property under possession and management of another was occupied by the testator. It then called attention to the fact that the subsequent part of the clause gave to the wife the crops which may at the death of the testator, be thereon, and that by no possible construction could it be extended to crops on a farm in the occupation of a tenant, as by the terms of the lease, the testator was not entitled to any part of the crops.

The court in the course of its opinion stated in part as follows:

> "It is a general and settled distinction running through all the cases on this subject, that extrinsic evidence cannot be received to contradict, vary or add to an instrument in writing, but only to explain and elucidate it and this only in the case of a latent ambiguity."

CONCLUSION.

From the above it is apparent that:

1. There are no questions presented (a) of general importance or (b) relating to the construction or application of the Constitution, or a treaty or statute, of the United States which have not been, but should be, settled by this Court, or (c) which indicate the lower court has failed to give proper effect to an applicable decision of this Court.

2. The Court of Appeals was correct in deciding:

(A) That extrinsic evidence is admissible to prove whether or not a latent ambiguity exists.

(B) That the extrinsic evidence offered disclosed a latent ambiguity did exist.

(C) That as a latent ambiguity was shown to exist, extrinsic evidence was admissible to remove the ambiguity.

(D) That when the whole will and extrinsic evidence are considered it is plain that the testatrix meant the respondent.

It is respectfully submitted that the Petition for Writ of Certiorari to bring before this Court the decision and judgment of the United States Court of Appeals for the District of Columbia should be denied.

WILLIAM F. KELLY

P. J. J. NICOLAIDES

RICHARD H. NICOLAIDES

CATHERINE B. KELLY
Counsel for the Respondent
1511 K Street, N. W.
Washington 5, D. C.

May 4, 1951.

Certificate of Service.

I, certify that I did on the 4th day of May, 1951, serve a copy of the foregoing brief on the petitioner by leaving a copy thereof at the office of Dean Hill Stanley, Shoreham Building, Washington, D. C., counsel of record for the petitioner.

P. J. J. NICOLAIDES,
Counsel for the Respondent.